89-292

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ESTATE OF JACK GILPIN

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MILTON L. CHAPPELL
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel for Petitioner

August 21, 1989

52 pp

QUESTION PRESENTED

Whether the judgment and opinion of the court of appeals should be vacated because the case has become moot by the unilateral action of the respondent union several weeks prior to the filing of the petition for a writ of certiorari?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were:

Plaintiffs: Jack Gilpin (now deceased), Stephen A. Petrilli, Jerome [Jeanne] A. Dietrich, Margaret E. Dailey, Sandra S. Coe, Karen Hirstein, Ray Anderson, Gail Mueller [Micheletta], and Scott Mauck.[1]

Defendants: American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME"); and in their official capacities,[2] Roland Burris, Comptroller of the STATE OF ILLINOIS; Richard McClure, Director of the ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES; Gregory L. Coler, Director of the ILLINOIS DEPARTMENT OF PUBLIC AID; Edward Duffy, Director of the ILLINOIS DEPARTMENT OF ALCOHOLISM AND SUBSTANCE ABUSE; David W. Hardwick, Director of the ILLINOIS DEPARTMENT OF VETERAN'S AFFAIRS; Larry Werries, Director of the ILLINOIS DEPARTMENT OF AGRICULTURE; Brad Evilsizer, Director of the ILLINOIS DEPARTMENT OF MINES AND MINERALS; Gregory W. Baise, Director of the ILLINOIS DEPARTMENT OF TRANSPORTATION; Bernard J. Turnock, Director of the ILLINOIS DEPARTMENT OF PUBLIC HEALTH; Michael B.

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[1] In light of the recent decisions of *Torres v. Oakland Scavenger Co.*, __ U.S. __, 108 S. Ct. 2405 (1988); *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988); this petition is filed only on behalf of the Estate of Jack Gilpin, whose decedent was, in retrospect, the only appellant in the court of appeals.

[2] The real party in interest in an official-capacity suit is the entity represented and not the individual office holder. *Karcher v. May*, 484 U.S. 72, 108 S. Ct. 388, 393 (1987); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

Witte, Director of the ILLINOIS DEPARTMENT OF CONSERVATION; John E. Washburn, Director of the ILLINOIS DEPARTMENT OF INSURANCE; James B. Zagel, Director of the ILLINOIS DEPARTMENT OF LAW ENFORCEMENT; J. Thomas Johnson, Director of the ILLINOIS DEPARTMENT OF REVENUE; Michael Fryzel, Director of the ILLINOIS DEPARTMENT OF FINANCIAL INSTITUTIONS; Mike Woelffer, Director of the ILLINOIS DEPARTMENT OF COMMERCE AND COMMUNITY AFFAIRS; Terry Lash, Director of the ILLINOIS DEPARTMENT OF NUCLEAR SAFETY; Michael Belletire, Director of the ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES; Gary L. Clayton, Director of the ILLINOIS DEPARTMENT OF REGISTRATION AND EDUCATION; Michael P. Lane, Director of the ILLINOIS DEPARTMENT OF CORRECTIONS; Gordon Johnson, Director of the ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES; Janet Otwell, Director of the ILLINOIS DEPARTMENT OF AGING; Joyce E. Tucker, Director of the ILLINOIS DEPARTMENT OF HUMAN RIGHTS; Susan Suter, Director of the ILLINOIS DEPARTMENT OF REHABILITATION SERVICES; Dr. Donald Etchison, Director of the ILLINOIS DEPARTMENT OF ENERGY AND NATURAL RESOURCES; Sally Ward, Director of the ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; and Richard Carlson, Director of the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Estate of Jack Gilpin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on May 24, 1989, and that said judgment and opinion in the above-entitled case be vacated and remanded with instructions to dismiss the cause as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 38-39 (1950).

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") 1a) is reported at 875 F.2d 1310. The district court's first opinion, entered on July 30, 1986 (App. 13a), is reported at 643 F. Supp. 733.[3] The district court's last two unreported opinions, entered on June 29, 1987, and June 14, 1988, are reproduced at App. 24a; 30a.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1989. This petition is being filed within ninety days from the date the judgment sought to be reviewed, vacated and remanded was rendered. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

STATEMENT OF THE CASE

Petitioner's decedent, Jack Gilpin, appellant below, and eight other nonunion employees, all of whom were employed by Illinois state and local agencies, were subject to a collective bargaining agreement, entered into pursuant to Illinois law, requiring them to pay compulsory agency fees to the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") as a condition of employment. By law, AFSCME was required to certify the amount of such compulsory fees, and the State then deducted the fees from the employees' paychecks, remitting the amounts collected to AFSCME.

The nine nonunion employees brought suit in September 1985 to contest the collection of such

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[3]None of the parties appealed from the first opinion.

compulsory fees.[4] After some preliminary hearings and rulings, the district court on July 30, 1986, determined that a "notice" concerning the fees, sent by AFSCME to employees in 1985, and the procedures for challenging the fees, were constitutionally defective under *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) (App. 13a). The next notice, sent by AFSCME in 1986, was also found to be constitutionally defective by Order entered June 29, 1987 (App. 24a). About three years after the case was filed, the district court finally ruled that a 1987 version of the notice was constitutionally sufficient (App. 30a).

Notwithstanding its previous findings of constitutional violations, the court determined there were no damages, denied restitution of fees for the two years the notice was found constitutionally defective, denied certification of a class for a second time, and dismissed the case (App. 30a). Jack Gilpin appealed.[5]

Jack Gilpin raised four issues on appeal which the court of appeals said "merit discussion" (875 F.2d at 1313; App. 4a). They were whether the district court: (1) should have certified the suit as a class action; (2) should have issued a preliminary injunction against collection of the 1985 fees; (3) should have ordered restitution of fees collected in 1985 and 1986; and (4) should have, as it did, found the 1987 notice adequate.[6] Nonetheless, the court of appeals rejected all four issues and "dismissed [the

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[4]Jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1343, 2201-02 and 42 U.S.C. § 1983.

[5]See note 1, *supra*, at ii.

[6]Gilpin also raised in his brief the issue whether, at least, nominal damages should have been awarded for the adjudicated constitutional violations. The court of appeals did not discuss this issue.

appeal] insofar as it challenges the denial of the plaintiffs' motion for a preliminary injunction [and o]therwise . . . affirmed [the judgment]." (875 F.2d at 1316-17; App. 12a.)

SUGGESTION OF MOOTNESS

While it is probably rare for the petitioner to suggest mootness, nevertheless, this Court has reminded counsel that they have a duty to inform the Court of any development that would suggest mootness. *See Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985); *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring); *cf. Honig v. Students of California School for the Blind*, 471 U.S. 148, 152 (1985) (Marshall, J., dissenting).

"When a claim is rendered moot while awaiting review by this Court," *Deakins v. Monaghan*, 484 U.S. 193, 108 S. Ct. 523, 528 (1988), it falls upon the petitioner to suggest that the cause is moot. Such is the case here.

The prospective equitable issues and requested relief became moot upon Jack Gilpin's recent death. However, the issue of restitution[7] still existed because union dues and fees had been automatically deducted from Jack Gilpin's salary during the two years the district court had determined the necessary constitutional procedures for such collections were absent.

Then, a month before this petition for certiorari was due, AFSCME unexpectedly and unilaterally sent

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[7]The court of appeals' denial of restitution conflicts with the allowance of restitution by the Sixth Circuit and the Ohio Supreme Court when the required *Hudson* safeguards are absent. *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Gibney v. Toledo Federation of Teachers*, 40 Ohio St. 3d 152 (1988).

petitioner and the other eight nonunion plaintiffs checks in amounts that exceeded the amount of restitution petitioner had planned to request this Court to order.[8]

Petitioner has accepted this payment as complete settlement of all outstanding claims. Consequently, there no longer is a live controversy between the parties, nor any questions that can affect the rights of the litigants in this case, nor the concreteness and kind of adversariness which assures a presentation with requisite diligence and fervor that is necessary for a Federal court to decide a case. *See Deakins*, 108 S. Ct. at 528; *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *Sibron v. New York*, 392 U.S. 40, 57 (1968).

REASONS FOR GRANTING THE WRIT

Since the issues in this case are now moot, this Court should grant the Estate of Jack Gilpin's petition for a writ of certiorari, vacate the judgment and opinion of the court of appeals, and remand with instructions to dismiss the cause as moot.

When events occurring after the court of appeals has decided a case but before the Supreme Court has acted on a petition for certiorari have, as here, eliminated any possibility that the Court's order may grant meaningful relief affecting the controversy that precipitated the litigation, it is the duty and established practice of this Court to grant the petition for writ of certiorari, vacate the

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[8]Rather than the 1% of the amount deducted in 1986, which the court of appeals noted AFSCME had promised to return and upon which the court based its denial of any additional restitution (875 F.2d at 1312, 1313-15; App. 3a, 6a-7a), AFSCME returned 120% of that year's deduction!

decree below and remand the cause with directions to dismiss the complaint as moot. *Onwuasoanya v. United States*, ___ U.S. ___, 109 S. Ct. 299 (1988); *Deakins*, 108 S. Ct. at 526-29 & nn. 4&5; *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979); *Weinstein v. Bradford*, 423 U.S. 147 (1975); *Munsingwear*, 340 U.S. at 39-41; *Commodity Futures Trading Commission v. Chicago Board of Trade*, 701 F.2d 653, 656-57 (7th Cir. 1983); Note, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. ILL. L. REV. 731, 745-49.

One of the reasons for vacating the lower court's decision when the case becomes moot during the appeal process is to ensure that a decision, of which the losing party, the Estate of Jack Gilpin, was denied appellate review because of happenstance and the unilateral action of the winning party below, will not have a preclusive effect in subsequent litigation. The Court also vacates lower court decisions that subsequently become moot because such interim findings lack the stamp of reliability that comes from surviving appellate review. *Id.* Both reasons are applicable herein.

CONCLUSION

For the foregoing reasons, it is therefore respectfully submitted that the Court should grant the petition for writ of certiorari, vacate the judgment and opinion of the court of appeals, and remand with instructions to dismiss the cause as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Respectfully submitted,

MILTON L. CHAPPELL, ESQUIRE
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorney for Petitioner,
Estate of Jack Gilpin

August 21, 1989

In the United States Court Of Appeals For the Seventh Circuit

No. 88-2441
JACK GILPIN, *et al.*,

Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 85 C 3479—Richard Mills, Judge.

ARGUED JANUARY 17, 1989—DECIDED MAY 24, 1989

Before WOOD, JR., POSNER, and FLAUM, *Circuit Judges.*

POSNER, *Circuit Judge.* A union that has been certified as the exclusive bargaining representative for a group of employees must represent every employee in the bargaining unit, even those who don't belong to the union. Correlatively, the union is entitled to charge the nonmembers their pro rata share of the expenses that it incurs in negotiating for and administering the collective bargaining agreement, and to ask the employer to deduct this pro rata share from the nonmembers' wages. But if the union goes further and makes the nonmembers pay either the full union dues or an agency fee that exceeds the collective-bargaining costs fairly chargeable to

nonmembers, the union—and the employer—can get into legal trouble. If the collective bargaining agreement is with a *public* employer (state or local) that deducts the union's agency fee from its employees' wages, and part of the fee is used to advance the union's *political or ideological* goals as distinct from defraying the union's expenses of negotiating and administering the collective bargaining agreement, both the public employer and the union can be held liable in a suit under 42 U.S.C. § 1983 for violating the nonmembers' right of free speech under the First Amendment (made applicable to the states by interpretation of the Fourteenth Amendment). See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). What is more, the First Amendment has been held to require the public employer and the union to establish efficacious procedures, including notice and right to a hearing, for determining how much of the union's proposed agency fee is proper. See *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ping v. National Education Ass'n*, 870 F.2d 1369 (7th Cir. 1989).

In September 1985 nine nonunion employees of Illinois state and local agencies brought this suit against the local of the American Federation of State, County, and Municipal Employees that represents those employees in collective bargaining, and against the employers themselves. Several weeks earlier, the union had decided that for the new school year the agency fee (called "fair share fee") would be 90 percent of the union dues, and the union had so notified the employees in the bargaining unit. Shortly after filing the suit the plaintiffs moved for a preliminary injunction to prevent the deduction of the agency fee for the 1985 school year. The motion was denied and the employers proceeded to deduct the fee from the wages of the nonunion employees in the bargaining unit and to pay over the amount deducted to the union, which however placed the entire amount in an interest-bearing escrow account. Although 10,000 of the 20,000 to 30,000 employees in the bargaining unit do not belong to the union, the district judge refused to certify the suit as a

class action.

After the Supreme Court decided *Hudson* in 1986, the district judge held that both the first notice sent by the union to employees regarding the "fair share fee" for the 1985 school year and the procedure that had been used to determine the fee were defective. For the 1986 school year the union sent a new notice after fixing the fee at 96 percent of the union's dues. It also asked the American Arbitration Association to appoint an arbitrator to determine the proper agency fee for both 1985 and 1986, as well as for future years. The arbitrator ruled that in 1985 the proper agency fee would have been 95 percent of union dues, so the nonmembers had gotten a bargain at 90 percent. He ruled that 95 percent was also the proper percentage for 1986, so the union had overcharged nonmembers by 1 percent that year. He directed the union to remit the 1 percent overcharge to the nonmembers from the escrow account together with the interest that had accrued in the account, and the union has agreed to do this. The nonmembers were not required to remit their 5 percent 1985 windfall. The plaintiffs in this suit were not parties to the arbitration proceeding and have not challenged the arbitrator's determinations regarding the proper agency fees for 1985 and 1986.

The district judge was dissatisfied with the 1986 notice but concluded that no harm had been done since the union had agreed to refund the overcharge to all nonmembers, whether or not they had challenged the 1986 agency fee. For the 1987 school year the union prepared a fuller notice, which the judge found adequately informative. The arbitrator has not yet ruled on the propriety of the fee that the union set for 1987 (at 91 percent of union dues), but the union has agreed to abide by whatever ruling the arbitrator makes and to refund any overcharge that he finds to all nonmembers whether or not they challenge the ruling. On the basis of the union's undertakings and the revision of the notice, the judge decided there was no need to order any relief, and he

entered judgment for the defendants.

The plaintiffs appeal, raising four issues that merit discussion: whether the judge should have certified the suit as a class action, given the large number of nonunion employees; whether he should have issued a preliminary injunction against the collection of the 1985 agency fee; whether the plaintiffs are entitled to restitution of the money deducted from their wages in 1985 and 1986, the years for which, the judge found, the union's notices were inadequate; and whether the 1987 notice was inadequate.

The district judge was right not to certify the suit as a class action on behalf of the 10,000 nonunion members. A potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately. See Fed. R. Civ. P. 23(a)(4); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1284 (7th Cir. 1985). Two distinct types of employee [sic] will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with—the aims of the first type of employee. The Foundation is seeking repayment to *all* the bargaining unit's nonunion employees of the *entire* agency fees collected by the union in the 1985 and 1986 school years (with interest), even though the Foundation has not challenged the arbitrator's determination that the union was entitled to *more* than the amount it actually collected in 1985 and to 99 percent of the amount it collected in 1986. Not only would the

"restitution" that the Foundation seeks confer a windfall on the nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy. The National Right to Work Foundation is not an adequate litigation representative of those employees. Nor did it or anyone else propose that the judge certify two classes. Finally, there is little—perhaps no legitimate—need for a class action here. The union's policy is to refund any overcharges determined by the arbitrator to all nonunion members, whether or not they are parties to a judicial or arbitral proceeding; and the nonunion members are not entitled to any additional monetary remedy, as we shall see.

We can be briefer about the second issue. The correctness of the order denying the preliminary injunction is thoroughly moot. The plaintiffs were trying to enjoin the deduction of agency fees for 1985. The judge refused and the fees were deducted. Even the United States Court of Appeals for the Seventh Circuit cannot make time run backwards.

We come to the third issue, restitution. At argument we pressed the plaintiffs' counsel for an explanation of how his clients could have been hurt by the inadequate notices sent in 1985 and 1986. The arbitrator—whose decision the plaintiffs have not challenged—found that the union had undercharged the plaintiffs for 1985, and the union has agreed to refund with interest the slight overcharge that it had exacted in 1986 though never enjoyed, having placed the entire agency fee in escrow. The plaintiffs actually *benefited* from the inadequate notice. The function of the notice is to give employees who don't belong to the union enough information about the agency fee for the forthcoming year to enable them to decide whether to challenge it. Had the plaintiffs received a fuller notice they might have mounted such a challenge.

But a challenge could only have cost them; it could not have benefited them. A challenge to the 1985 fee would have been worse than futile, given the arbitrator's finding that the fee was too low, while a challenge to the 1986 agency fee would have been futile because the arbitrator ordered the tiny overcharge in that fee refunded to all nonunion employees—even those who, like the plaintiffs, did not challenge the fee, whether because the notice was inadequate or for other reasons. The plaintiffs got something for nothing, thanks in part to the defective notices of which they complain.

The plaintiffs remind us that this is a First Amendment case, so that the principle that underlies the previous paragraph—the principle that denials of due process that do no measurable harm give rise to no damages, see, e.g., *Carey v. Piphus*, 435 U.S. 247 (1978)—may not apply. But the principle of *Carey* is not limited to due process cases. As the Supreme Court later explained in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), whatever the constitutional provision that is violated, there can be no award of compensatory damages if there is no harm (i.e., no loss to compensate *for*). See also *Cygnar v. City of Chicago*, 865 F.2d 827, 848 n. 21 (1989); *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 602 (5th Cir. 1988). What is true is that in areas where harm occurs but is not readily monetizable, an award of general damages may be permitted, and taking away a person's right of free speech may be such a case. See, e.g., *Memphis Community School District v. Stachura, supra*, 477 U.S. at 310-11; *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1558-59 (7th Cir. 1986); *Ustrak v. Fairman*, 781 F.2d 573, 578-79 (7th Cir. 1986); *Parrish v. Johnson*, 800 F.2d 600, 606-07 (6th Cir. 1986). But it is still necessary to show some harm.

We can *imagine* an argument that these plaintiffs suffered harm. In 1986 their employers deducted a larger agency fee than was proper, and although the excess was placed in escrow and not used to fund the union's political

activities, the plaintiffs lost the use of the money, which they might have devoted to the support of political activities of their own choosing. Whether this is a sound argument, cf. *Lowary v. Lexington Local Board of Education*, 854 F.2d 131 (6th Cir. 1988), and what bearing the undercharge in 1985—which freed up funds for the plaintiffs to use on political activities if they chose, and which greatly exceeded the 1986 overcharge—should have on it, we need not consider. The plaintiffs allude to this argument in asking us to reverse the denial of their motion for a preliminary injunction but do not mention it in connection with their claim for monetary relief. Indeed, they do not seek damages. Instead they seek a remedy—restitution—that is ordinarily (although not invariably) a substitute for rather than a form of damages. See, e.g., *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 748 (7th Cir. 1988); Dobbs, Handbook on the Law of Remedies 224 (1973) ("The damages recovery is to compensate the plaintiff, and it pays him, theoretically, for his losses. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep"). For example, a copyright holder who has suffered no damages can seek restitution of the infringer's profits in lieu of damages. See 17 U.S.C. § 504; see also 15 U.S.C. § 1117 (trademark infringement). But this avenue (restitution as the remedy for unjust enrichment) is closed to these plaintiffs, not only because the defendants derived no benefit from agency fees deposited in an escrow account but also because those fees did not exceed the union's bona fide expenses on behalf of the plaintiffs and the other nonunion employees. There was no enrichment, and it was not unjust.

The plaintiffs want the entire escrow account paid over to them and the other union nonmembers even though all of the money in it (with the exception of the 1 percent of the 1986 fee that the union has agreed to refund) is necessary—and inadequate—to defray costs properly incurred by the union in representing non-members in

collective bargaining, and even though the union derives no benefit from agency fees held in escrow. It is a severely punitive remedy the plaintiffs seek, not one properly described as restitution at all. It would be suitable if at all only if the defendants had been guilty of willful or malicious violations of the Constitution. Yet the 1985 notice which the district judge found to be defective had been issued before the Supreme Court decided the *Hudson* case, and the 1986 notice was ten pages long and contained voluminous information concerning the agency fee. The only defect the district judge found in the 1986 notice lay in the brevity of the union's description of the procedure for challenging the agency fee. The notice stated: "AFSCME Local 2000 has established an Arbitration Procedure for resolving challenges to the amount of the Fair Share Fee. This procedure will result in expeditious decision on the challenge by an impartial decision maker. Challengers will receive further information regarding this procedure upon the union's receipt of their challenge." The notice gave an address and deadline for mailing a written challenge that "must include the challenge fair share fee payer's ('Challenger's') name, address, social security number, job title, employer and employing agency and location." The district judge thought the notice should contain more details about the arbitration procedure. Maybe so, but this is a matter of judgment and the union can hardly be thought a willful violator of the First Amendment for having guessed differently. Since to file a challenge costs only a postage stamp plus a small amount of time to supply the tiny amount of information that the challenge must set forth, one would not have thought a challenger needed a detailed prospectus of the arbitration procedure before filing.

The 1987 notice contains the following substitute paragraph, approved by the district judge, for the one we quoted from the 1986 notice:

> AFSCME Local 200 has established an Arbitration Procedure for resolving challenges to the amount of

> the Fair Share Fee. This procedure will result in an expeditious decision on the challenge by an impartial decision maker. The decision maker will be an arbitrator selected by the American Arbitration Association. An arbitration proceeding will be conducted by the arbitrator pursuant to the rules of the American Arbitration Association governing fair share cases. AFSCME will have the burden of proving that the fair share fee is proper. Challengers will have a chance to appear before the arbitrator to state their objections to the fair share fee. The arbitrator will issue a decision regarding challenges to the amount of the fair share fee 30 days after submission of final arguments regarding the amount of the fee. Challengers will receive further information regarding this procedure upon the union's receipt of their challenge.

Is this an improvement? Is it the constitutional *minimum*, as the district court thought? It is more informative, but also longer and more complex. It may invite a few more challenges, but so what? The arbitrator will order a refund to all union nonmembers who are overcharged, whether or not they file a challenge; so only one challenger is necessary. And there will always be at least one whether or not the notice is informative; the National Right to Work Foundation will see to that, you can be sure.

The issue is not whether the provision regarding challenges in the 1986 notice was constitutionally inadequate—an issue no party has raised—but whether its inadequacy was so patent that the union should be punished by being deprived of millions of dollars ($6 million to be precise) to which it is otherwise lawfully entitled. We think not. The constitutional violation was a technical one at worst, and a punitive remedy is not

called for. What the plaintiffs call restitution we call punitive damages, and the Supreme Court has set forth standards for the award of punitive damages in civil rights cases that the plaintiffs have not attempted to satisfy. See *Smith v. Wade*, 461 U.S. 30 (1983); *Soderbeck v. Burnett County*, 752 F.2d 285, 289-91 (1985); *Walsh v. Mellas*, 837 F.2d 789, 801-02 (7th Cir. 1988); *Erwin v. County of Manitowoc*, Nos. 88-1211, 88-1263, slip op. at 13 (7th Cir. April 19, 1989).

Indeed, if we ordered the union to turn over the escrow account to the plaintiffs and the other nonunion employees, the *union* would have a strong claim for restitution. For the union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things that exceeded the amount in the escrow account for 1985 and 1986. The plaintiffs do not propose to give back the benefits that the union's efforts bestowed on them. These benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law, and the conferral of the benefits on the plaintiffs would therefore give rise under conventional principles of restitution to a valid claim by the union for restitution if the union were forced to turn over the escrow account to the plaintiffs and others similarly situated to them. See, e.g., *Goldstick v. ICM Realty*, 788 F.2d 456, 467 (7th Cir. 1986); Palmer, The Law of Restitution §§ 1.2, 4 (1978 and Supp. I 1984); Dobbs, *supra*, at 232-35. In claiming restitution the plaintiffs are standing that remedy on its head. This is further proof that they are seeking punitive damages by another name without having satisfied the conditions for an award of punitive damages in a civil rights case.

The last issue is whether the 1987 notice provided sufficient information regarding not the procedures for challenging the agency fee but the allocation of union expenses between agency and other accounts. The plain-

tiffs complain that the breakdown is not detailed enough to enable them to determine whether a challenge to the agency fee is likely to succeed. Yet the notice breaks down the union's activities into 35 categories and indicates which ones the union considers activities wholly in support of its agency mission (e.g., adjusting grievances under the collective bargaining agreement), which it considers wholly unrelated to that mission (e.g., contributing to political campaigns), and which it considers a mixture of agency and other functions (e.g., publishing a union newsletter). The notice recites that the arbitrator has found that the union's allocation of expenses in accordance with this breakdown is proper, and offers a copy of his detailed ruling for $1.50. The notice contains another list of 35 items—not the 35 separate activities that the union engages in but the 35 different types of expenditures listed in its audited financial statement (salaries and benefits, depreciation, telephone, etc.)—and indicates what percentage of each is chargeable to union nonmembers as part of the agency fee.

The plaintiffs complain that despite its detail the notice does not explain the principles under which, say $16,788 out of a total of $17,445 for "Editorial Services" is chargeable to the agency fee portion of union dues. But if it did, the notice would be as long and complicated as an SEC prospectus. The notice indicates which activities the union considers to be wholly or partly in pursuit of its agency mission, and what percentage of each expenditure item is allocated to that mission. This should be enough information (in contrast to the notice held deficient in *Damiano v. Marsh*, 830 F.2d 1363 (6th Cir. 1987)) to allow the employee to decide whether there is any reason to mount a challenge. Cf. *Chicago Teachers Union v. Hudson, supra* 475 U.S. at 306-07. Since mounting a challenge is for all practical intents and purposes free and since only one challenger is necessary to obtain a refund for all nonunion employees, we cannot see the point in requiring the union to provide even more information than the district judge required. In objecting to the notice, the

plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union.

The appeal is dismissed insofar as it challenges the denial of the plaintiffs' motion for a preliminary injunction. Otherwise the judgment is affirmed. Costs in this court to the defendants.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Jack GILPIN, et al., Plaintiffs,
v.
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, et al., Defendants.

No. 85-3479.

United States District Court,
C.D. Illinois,
Springfield Division.

July 30, 1986.

ORDER

MILLS, District Judge:

The parties offer cross motions for summary judgment. Fed.R.Civ.P. 56. The Court finds that liability rests with the Defendants who have denied the Plaintiffs their rights to procedural due process in violation of 42 U.S.C. § 1983. Jurisdiction is appropriately premised on 28 U.S.C. § 1331.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the Court must view the facts in the light most favorable to the party against whom summary judgment is entered and give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Cross motions for summary judgment require no less careful scrutiny of the factual allegations. *LaCourte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir.1983). The Court's inquiry "unavoidably asks whether

reasonable jurors could find by a preponderance of the evidence that the Plaintiff is entitled to a verdict—'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onis* of proof is imposed.'" *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986), (*quoting Improvement Co. v. Munson*, 14 Wall. 442, 448, 81 U.S. 442, 448, 81 U.S. 442, 20 L.Ed. 867 (1872) (emphasis in original).

The posture of this particular litigation facilitates adherence to these guidelines. The parties have hammered out an understanding of the facts by dent of hard labor.

The Plaintiffs are employees of the State of Illinois, specifically the Department of Public Aid. The employees of the Department of Public Aid are divided into at least two bargaining units for the purpose of administering a collective bargaining agreement entered into between the State of Illinois and Defendant American Federation of State, County, and Municipal Employees (AFSCME). Although none of the Plaintiffs are members of Defendant AFSCME, they have been assigned to one of two bargaining units: RC-62 or RC-63. As of August 30, 1985, there were 12,289 state employees assigned to these two bargaining units and approximately half of these employees were not members of Defendant AFSCME.

On February 10, 1984, Defendant AFSCME entered into an agreement with the Illinois Department of Central Management Services (CMS), an agency of the state that has statutory authority to negotiate and administer collective bargaining agreements. The February 10th agreement provided for the assessment and collection of

"fair share" contributions from state employees who were not members of AFSCME.[1]

"Fair share" assessments are fees deducted from the paychecks of non-union employees and paid to the union as a pro rata assessment of the costs of conducting collective bargaining activities from which the non-union employees necessarily benefit. The parties do not contest the constitutionality of "fair share" assessments, rather the Plaintiffs object to the procedure whereby the fees were collected.

After entering into the "fair share" agreement, CMS notified various state department managers by letter of the impending "fair share" assessments in late April and again in early July 1984. By August 30, 1985, a majority of the employees in bargaining units RC-62 and RC-63 became members of Defendant AFSCME. Thereupon Defendant AFSCME notified CMS of its intention to seek "fair share" deductions from all employees who were not members of

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[1]The relevant portion of the agreement provides:

> Pursuant to Section 3(g) of the Illinois Public Labor Relations Act effective July 1, 1984, the parties agree that in bargaining unites [sic] in which AFSCME has or attains majority union membership, or receives a majority decision by referendum as set forth below, subsequent to July 1, 1984, the following shall be applicable: Employees covered by this agreement who are not members of the Union or do not make application for membership within fifteen (15) days of employment, shall be required to pay, in lieu of dues, their proportionate share of the cost of the collective bargaining process, contract administration and the pursuance of matters affecting wages, hours and conditions of employment, but not to exceed the amount of dues uniformly required of members. The proportionate share payment, as certified by the Union pursuant to Section 6(e) of the Illinois Public Labor Relations Act, shall be deducted by the Comptroller from the earnings of the non-member employees and shall be remitted semi-monthly to the Union.

Complaint Exhibit 1 at 1.

the union. Pursuant to the agreement entered into between AFSCME and CMS, AFSCME certified the "fair share" contribution to be 90% of regular union dues.

On September 6, 1985, CMS informed the various state agencies that deductions for "fair share" contributions would begin with the September 16 through 30 pay period. Between September 10 and September 30, 1985, members of Defendant AFSCME placed notices of the impending "fair share" assessments on bulletin boards throughout the state offices. (Exhibits affixed to Defendant AFSCME's reply to Plaintiffs' motion for a preliminary injunction.) The notices indicated that the "fair share" assessment would be "90% of local union dues paid by AFSCME members." They gave a brief explanation of the manner in which the percentage was determined. And they stated that the deductions would begin with the September 30, 1985, pay period. Both notices provided the following information regarding objections to and appeals from the "fair share" assessments:

> Non-members have the right to object to the amount of the "fair share" fee and may do so (1) through AFSCME's internal procedure; or (2) by filing an unfair labor practice charge with the Illinois Public Employee Labor Relations Board, 320 West Washington St., Suite 500, Springfield, Illinois;
>
> For further information:
> write: AFSCME Council 31, Attention Jackie Kinnamen, 201 North Wells St., # 1850, Chicago, Illinois 60606.

This suit was filed on September 27, 1986. The first pay period during which "fair share" assessments were deducted ended on September 30, 1986. Two days later, CMS sent a letter to all affected employees signed by Bureau of Personnel Manager Robert H. Tapscott which in substance tracked the notices posted by Defendant AFSCME. (Plaintiff's Exhibit 6). With respect to the opportunity to object and appeal the CMS letter provided:

> You have a right to challenge the amount of the fair share assessment levied by the union. You can obtain more information about how to challenge the assessment amount by writing: AFSCME, Attention Jackie Kinnamen, 201 North Wells St., Suite 1850, Chicago, Illinois 60606 . . . Should you have any further questions, you may contact the Bureau of Personnel, Division of Employee and Labor Relations, at (217) 782-8164.

The day following the appearance of the CMS letter, 31 non-union employees filed complaints with the Illinois State Labor Relations Board (SLRB).[2] One week later, the first paychecks subject to the "fair share" deductions were issued.

At the time the "fair share" deductions were assessed and the notices were promulgated, the Illinois State Labor Relations Board (SLRB) had established no specific rules or regulations for considering objections to the assessments. On October 22, 1985, the SLRB directed its counsel to draft such rules and regulations and to report back by November 20, 1985. On November 20, the SLRB assumed jurisdiction over the complaints lodged against the "fair share" assessments. Five days later, AFSCME established an escrow account for the "fair share" assessments paid by all non-union employees whose objections to the assessments were known to AFSCME. The SLRB issued a complaint on the consolidated charges on December 3, 1985. A hearing on that complaint has been postponed several times at the request of the complainants.

Although the objection and appeal procedure advertised in AFSCME's posted notices was, in fact, not yet available, Defendant AFSCME did have in place an internal union grievance procedure. Under this procedure,

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[2]The Court is informed that subsequent to the filing of this cause additional employees have filed complaints with the SLRB.

an objecting, non-union employee may file a written challenge with the union to be reviewed by the Executive Board of AFSCME Council 31. An objector may appeal the Executive Board's decision to a professional arbitrator chosen and compensated by agreement of the union *and* the objector. As a second internal union remedy, a non-union employee may file a challenge directly with the union local's International affiliate and obtain a hearing from a designated hearing officer. The record does not indicate the existence of, or the nature of, any appeal or review of the decision by the International's hearing officer.

Law

The Plaintiffs contend that this cause of action is controlled by the Supreme Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, ___U.S.___, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). The Defendants respond (1) that this Court should observe the doctrine of abstension [sic]; (2) that they have afforded the Plaintiffs all the procedure due; (3) that any procedural defects have been or are being cured and thus mooted; and (4) that the procedural guidelines outlined in *Hudson* should only be applied prospectively. After a review of the materials submitted for consideration, the Court finds that the *Hudson* decision does control the resolution of this cause, that the procedure outlined therein was violated by the Defendants, and that a remedy should be fashioned.

The equitable doctrine whereby a federal court abstains from considering a complaint pending resolution of the same or similar claims by a state tribunal is applicable where the complainant has the option of choosing between a federal or state forum and where the resolution of unsettled questions of state law will end the controversy. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); see also *Askew v. Hargrave*, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971). Defendant AFSCME

apparently contends that if this Court were to abstain and thereby allow sufficient time for correction of any procedural flaws, the Plaintiff's cause of action would thereby be mooted. Such an abstension [sic] would not, however, vindicate those constitutional rights Plaintiffs were and continue to have been denied. See *Hudson*, 106 S.Ct. at 1075 n. 14.

The parties do not dispute that the deduction of "fair share" fees impinges on recognized liberty and property interests to which the strictures of the Fourteenth Amendment's due process clause apply. The parties' dispute lies in determining the precise nature of the procedures that are due. However, this dispute has been effectively resolved by the United States Supreme Court:

> We hold today that the constitutional requirements for the union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Hudson at 1078. The procedure which Defendant AFSCME instituted in the fall of 1985 fails both the notice and appeal criteria outlined by the Supreme Court.

I. The "notices" published by the Defendants fail the test of adequacy in three respects.

First, the notice must inform all interested parties of the rationale behind the calculation of the "fair share." "The union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Hudson* at 1076 n. 18 (Relatively large expenditures, the Supreme Court indicates, should be divided into their component parts so as to demonstrate

with specificity the nature of the expenditure). The notices to which the Plaintiffs object merely indicated the union's conclusion as to the appropriate percentage of its budget expended on negotiation and failed to give detailed figures verified by an independent audit.

The second inadequacy in the notice Defendants provided Plaintiffs lies in the failure to provide sufficiently specific information on the procedure for lodging an objection to the "fair share" assessment. The notices posted by Defendant AFSCME did inform potential objectors that two avenues of redress existed and provided addresses for the SLRB and AFSCME Council 31. The notices did not contain phone numbers for the respective offices and, more importantly, they did not explain the procedure for making an objection known. The Supreme Court has indicated that "the non-members 'burden' is simply the obligation to make his objections known." *Hudson* at 1076 n. 16. The notices posted by the Defendants, by their lack of information regarding the procedure for objection, imposed upon the Plaintiffs not only the burden of objecting but also the burden of discovering how to object. Adequate notice entails information sufficient for an individual, unsophisticated non-union employee to file a written objection without further investigation.

Adequate notice also implies timely notice. Although the timing of the notice provided to the Plaintiffs in *Hudson* was not at issue before the Supreme Court, this Court finds that adequate notice requires notification a sufficient time prior to the deprivation so as not to present the deprived party with a *fait accompli*. In the present situation, although Defendant AFSCME notified the Department of Central Management Services of its intention to collect "fair share" assessments on August 30, 1985, neither the union nor the state made any attempt to notify the Defendants until September 10, 1985 (at the earliest), five days prior to the commencement of the first pay period during which "fair share" fees were to be

assessed. Without establishing an arbitrary period of time, the Court finds that the period of time necessary to establish the mechanics for deduction of the "fair share" fees is adequate for providing notice to any potential objectors. Once the union informs management of its desire to assess "fair share" fees in a specified amount, those against whom the fees will be assessed should also be notified of their right to object.

II. In addition to notice of their right to object, employees subject to "fair share" assessments are also entitled to "a reasonably prompt decision by an impartial decisionmaker." *Hudson* at 1076. The notices posted by the Defendants and the additional information available to objectors who write the union indicate three alternative avenues of appeal. An objecting non-union employee may file a charge with the State Labor Relations Board, or he may file an objection with AFSCME Council 31, or he may file an objection with the AFSCME International. *Hudson* requires only that the available procedure afford an objector "to have his objections addressed in an expeditious, fair, and objective manner." *Hudson* at 1076; see also *Id.* at 1076 n. 19.

None of the procedures available to the Plaintiffs here satisfy the minimum requirements of *Hudson*. The mechanism for mounting a challenge through the State Labor Relations Board, while potentially adequate, was essentially non-existent at the time the Defendants began deducting "fair share" fees. The appeal process through the AFSCME International fails for its use of hearing officers employed and therefore controlled by the union. *Hudson* at 1077. The appeal process through the union local has the distinct advantage of permitting both the objector and the union to select a mutually agreed upon arbitrator; however, an objector obtains arbitration of his claim only after review of his complaint by the local's Executive Board and thus falls short of the expeditious, fair and objective standard. None of the opposed methods of appeal provide "a reasonably prompt opportunity to

challenge the amount of the fee before an impartial decisionmaker." *Hudson* at 1078.

III. The union does appear to have satisfied the third major requirement of a valid "fair share" fee system by having established "an escrow account for the amounts reasonably in dispute while such challenges are pending." *Id.* at 1078. However, the *ex post* establishment of an escrow does not cure the procedural defects with respect to notice and appeal.

Contrary to the Defendants contentions, the Court finds that the constitutional strictures against which the Defendants' procedures have been measured were sufficiently established at the time the Defendants implemented their "fair share" assessments to require Defendants to adhere to them. The 7th Circuit's opinion in *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7th Cir.1984), had been handed down prior to the implementation of the "fair share" deductions challenged here. While much of the Seventh Circuit's opinion was advisory in nature, it did provide some guidance which the Defendants chose to abjure. Moreover, in *Hudson*, the Supreme Court specifically directed that the district court retroactively fashion a remedy in accordance with its elucidation of the procedures that were due.[3]

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[3]While the Court finds that the procedural requirements for the deduction of "fair share" fees were sufficiently established to justify retroactive application of the remedy to be fashioned, the Court's finding should not be construed as a determination that the legal standards were so clear as to justify the assessment of damages against the state officers who are Defendants here. The Court has previously ruled that the law with respect to "fair share" deductions was not so clear as to pierce the special immunity afforded our public decision-makers.

Remedy

Having found that the Plaintiffs rights were, indeed, violated, the Court now, of necessity, considers the question of an appropriate remedy. In fashioning the appropriate remedy, the Court turns to those officers who have thus far served the Court well during the pendency of this cause. The remedy shall include injunctive relief as well as damages and fees to the extent warranted. Its details should, in the first instance, be proposed by the parties who, in the nature of things, best understand the practical considerations of implementation. Its scope should be sufficiently broad to provide for all those who have been subject to procedures which essentially, if not intentionally, were unfair.

To this end, the Plaintiffs are directed to file a memorandum with a proposed remedy and Defendants shall respond. The Court will then convene a hearing to be attended by all parties—at which the precise details of the remedy will be determined.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS --
SPRINGFIELD DIVISION

JACK GILPIN, et al.,	)	No. 85-3479
	)	
Plaintiffs,	)	FILED
	)	JUN 29 1987
v.	)	JOHN M. WATERS,
	)	Clerk
	)	U.S. DISTRICT
AMERICAN FEDERATION	)	COURT
OF STATE, COUNTY AND	)	CENTRAL DISTRICT
MUNICIPAL EMPLOYEES,	)	OF ILLINOIS
et al.,	)	
	)	
Defendants.	)	

ORDER

MILLS, District Judge:

The American Federation of State, County and Municipal Employees (AFSCME) has moved to reconsider the Court's order of June 30, 1986, holding in favor of Plaintiffs and against the Defendants on the issue of their liability under 42 U.S.C. §1983. Pursuant to that order, the parties have submitted proposals concerning the appropriate remedy. In addition, updating briefs have recently been filed concerning AFSCME's attempted compliance with the June 30 order and the dictates of *Chicago Teachers Union v. Hudson*, 106 S. Ct. 1066 (1986). We now: (1) deny AFSCME's motion to reconsider; and (2) direct AFSCME to submit an amended draft of the proposed notice to all fair share fee payors.

The facts of this case are not disputed and are summarized in the Court's previous order. In that order,

we concluded that AFSCME's procedure for entertaining objections to the union's collection of the "fair share" fee prior to *Hudson* was defective because: (1) it did not adequately notify the payors of their right to object; and (2) the appeals process did not provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." Order of July 30, 1986, at p. 2.

AFSCME's motion to reconsider is premised upon the issue of mootness: it contends that after the *Hudson* decision, AFSCME voluntarily and fully implemented a system of procedures consistent with that case. It also maintains that the named plaintiffs have not suffered monetary damage as a result of any previous constitutional violation, thus mooting this case *in toto*. To buttress its conclusion, AFSCME has submitted memoranda outlining the steps it has taken to comply with our order and *Hudson*, as well as a nine-page document entitled "Notice to All Nonmember Fair Share Fee Payors" which it submits, satisfies the *Hudson* dictates for notice.

Plaintiffs' response points to a number of deficiencies in what they term "AFSCME's new and improved" procedures. Their primary objections, however, focus solely on the *Hudson* notice requirement. They no longer dispute that the AFSCME appeals process in fact affords prompt review before an impartial decisionmaker; Plaintiffs also concede that the *timing* of the notice provides the payors with enough time to object. Still, they claim that the substance of the notice provided does not give fair share fee payors enough information to knowingly take advantage of those procedures.

Although AFSCME appears to have undertaken a good faith effort to bring its procedures in line with *Hudson*, the notice given to fair share payors continues to fall short of the constitutional minimum. This order will therefore direct AFSCME to submit an amended draft of its proposed notice. In particular, the Court finds that

Plaintiffs' arguments with respect to notice of the procedures that will be followed *after an employee lodges his or her challenge* are well taken.

Currently, AFSCME's notice of the procedure for lodging a challenge states:

> AFSCME LOCAL 2000 PROCEDURE FOR CHALLENGING THE AMOUNT OF THE FAIR SHARE FEE
>
> AFSCME Local 2000 has established the following procedures for individual fair share payors who wish to challenge the foregoing calculation and the amount of the AFSCME fair share fee. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THESE PROCEDURES IN ORDER TO CHALLENGING [sic] THE AFSCME LOCAL 2000 FAIR SHARE FEE.
>
> Challenges
>
> Fair share fee payers must inform AFSCME Local 2000 of their challenge to the amount of the fair share fee in writing by mail. The written challenge must include the challenge fair share fee payer's ("Challenger's") name, address, social security number, job title, employer and employing agency and work location.
>
> The written challenge must be received by AFSCME Local 2000 at the following address and post-marked no later than May 31, 1986.
>
> AFSCME Local 2000
> 343 South Dearborn, Suite 1709
> Chicago, Illinois 60604
>
> B. AFSCME Local 2000 Arbitration Procedure
>
> AFSCME Local 2000 has established an Arbitration Procedure for resolving challenges to the amount of the Fair Share Fee. This procedure will result in expeditious decision on the challenge by an impartial decision maker. Challengers will receive further information regarding this procedure upon the union's receipt of their challenge.

Although this notice gives an employee enough information to *start* the procedure, it does not explain the process once the initial challenge is lodged. As this tribunal interprets *Hudson*, more detailed notice of the arbitration procedure itself is necessary to provide the nonunion employee with the information he needs to decide whether or not to object, and "to [thus] minimize the risk that nonunion employee contributions might be used for impermissible purposes . . ." *Hudson*, 106 S. Ct. at 1077. Similar to the disclosure of financial figures, leaving the nonunion employee completely in the dark about the arbitration procedure—and requiring them to object in order to receive information—does not adequately educate the employees about their procedural options. For example, proper notice should at least state that arbitration will ensue in accordance with the rules of the American Arbitration Association and that a copy of such rules are available well in advance of the deadline for filing an objection. This kind of notice entails a minimum of expense to the union, and decreases the risk that a nonunion employee would unknowingly bypass his right to object.

We therefore direct the Defendants to submit a further draft of the "procedural notice" section of its notice.

Plaintiffs also challenge the adequacy of the list of AFSCME expenditures contained in the notice. In *Hudson*, the Court held that the First Amendment demands that "potential objectors be given sufficient information to gauge the propriety of the union's fee." 106 S. Ct. at 1076. Plaintiffs maintain that AFSCME's list is defective because 35 types of AFSCME activities are grouped separately, and because there is no one-to-one relationship between those 35 activities and the list of expenses that follow. With this conclusion, the Court cannot agree.

Hudson itself noted that practical considerations render it impossible to expect "absolute precision" in the calculation of the charge to nonmembers:

> The union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as a verification by an independent auditor.

106 S. Ct. at 1076 n. 18.

Despite Plaintiffs' protests, AFSCME's notice meets these essential requirements. It first sets forth two separate lists of expenditures, one for the national union, and one for AFSCME Local 2000. Next, the notice states the amount of expenditure in each category considered chargeable to nonmembers in calculating the amount of the fee. It then details those activities which are funded with the use of fair share fees and those which are not. Finally, each of the categories of expenses are verified by an independent auditor. We conclude that this information satisfactorily outlines the major categories of expenses charged to nonunion employees, and provides a sufficient basis for the employee to determine whether to mount a challenge to the fair share assessment.

Nevertheless, because AFSCME's "procedural notice" remains inadequate, this case is not yet moot. *Ergo*, the motion to reconsider is DENIED. AFSCME is ordered to submit a proposed amendment to its notice within 30 days. Moreover, as a necessary consequence of our holding that the procedural notice remains defective, previously non-objecting employees must be afforded another opportunity to object to the deduction of their share.

ENTER: June 29, 1987.

FOR THE COURT:

Richard Mills
RICHARD MILLS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS --
SPRINGFIELD DIVISION

JACK GILPIN, et al.,	)	No. 85-3479
	)	
Plaintiffs,	)	FILED
	)	JUN 14 1988
v.	)	JOHN M. WATERS,
	)	Clerk
AMERICAN FEDERATION	)	U.S. DISTRICT
OF STATE, COUNTY, AND	)	COURT
MUNICIPAL EMPLOYEES,	)	CENTRAL DISTRICT
AFL-CIO, et al.,	)	OF ILLINOIS
	)	
Defendants.	)	

ORDER

MILLS, District Judge:

This case is before the Court following the issuance of a rule to show cause why this action should not be dismissed and a final judgment entered.

This rule followed two orders in which the Court held that AFSCME's procedure for entertaining objections to the union's collection of "fair share" fees was defective under the dictates of *Chicago Teachers Union, Local No. 1 v. Hudson*, 106 S. Ct. 1066 (1986).

The first order issued following the filing of cross motions for summary judgment. We ruled in favor of Plaintiffs and against Defendants and ordered both parties to fashion a remedy. Part of Defendants' submission on the remedy phase was a "motion to reconsider" the order granting Plaintiffs' motion for summary judgment.

The basis for granting Plaintiffs' initial motion was our finding that the notice to fair share fee payers was defective because: (1) it did not adequately notify the payers of their right to object; and (2) the appeals process did not provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." Order of July 30, 1986, p. 2.

AFSCME's "motion to reconsider" included a memorandum outlining their compliance with our order and the dictates of *Hudson*.

We found that the new notice provision was still defective with respect to the notice of the procedures that will be followed after an employee lodges his or her challenges. In all other respects, we held that the new notice complied with *Hudson* and the order of this Court. We ordered AFSCME to submit a proposed amendment to its notice in thirty days.

After receipt of the proposed amendment, we held that the new proposal fully complied with *Hudson* and the order of this Court. We also agreed with AFSCME's contention that Plaintiffs had not been prejudiced by the defect in the initial notice because AFSCME placed 100% of the fees collected to date in an interest bearing escrow account. Therefore, AFSCME never had use of the fees collected from Plaintiffs.

We have not changed our position regarding those conclusions made in the August 6, 1987, order. However, we do find that further comment is necessary to clarify the procedural posture of this case.

The confusion seems to have begun following the granting of Plaintiffs' motion for summary judgment. At that time, we ordered the parties to submit an appropriate remedy.

AFSCME did not submit a "proposed remedy", but instead filed the motion to reconsider referred to above. Technically, the motion to reconsider was improperly labeled as such.

First, there is no such creature as a "motion to reconsider" under the federal rules. Post-judgment relief is limited to situations discussed by Rules 59 and 60. *F/H Industries, Inc. v. National Union Fire Ins. Co.*, 116 F.R.D. 224, 225 (N.D. Ill. 1987). Second, the proposed notice which was subject to the June 29, 1987, order was submitted in response to an order of this Court that a remedy be fashioned by the parties. We construed AFSCME's motion to reconsider as being a response to our order to submit a remedy.

Hence, Plaintiffs' suggestion that the new notice is not properly before the Court is incorrect. It was before the Court prior to the June 29 order and once again before the Court prior to the August 6 order.

Nevertheless, whether labeled as a motion to reconsider or a proposed remedy, two questions were before the Court: (1) Did the new procedural notice comply with the *Hudson* guidelines? (2) Were Plaintiffs entitled to damages as a result of the previous defective notices?

Upon the proposal before the Court on the June 29 order, we answered the first question in the negative and therefore did not reach the issue of damages. As to the first question, we did note that AFSCME had cured a portion of the defective notice but that it was still defective in one aspect—procedures to be followed after the employee lodges the challenge.

However, upon review of the new proposal filed thirty days after the June 29 order, we found that "[AFSCME] has fully complied with this Court's interpretation of the

procedures mandated by *Chicago Teachers Union v. Hudson*. Order of August 6, 1987, at p. 1.

We also held that Plaintiffs were not prejudiced by the defects in the initial notices because the fees collected to date had been held in a interest bearing escrow account. This is consistent with our holdings throughout the case. We *never* held that the procedure was defective with regard to the establishment of the escrow.

This in turn decides the issue of damages. Plaintiffs cannot be entitled to any rebate of their fees if AFSCME has never had the use of those fees.

Plaintiffs also argue that the pendency of a class certification motion prevents the Court from entering judgment on this case. We disagree. The pendency of the class certification motion does not keep this case alive. First of all, this is not the first time a class certification motion has been pending before the Court in this case. We initially denied the request to certify a class at a hearing held on October 18, 1985. We stated our reasons on the record. We, however, stated that we would not preclude a renewed motion for class certification sometime later in the litigation. Nevertheless, we are in essential agreement with the reasoning stated in our prior denial.

Second, even in the event that the Court has changed its position, any renewal of the motion is most likely untimely filed. Because injunctive relief is no longer at issue, certification at this stage would have to contemplate the certification of a b(3) class. And a b(3) class cannot be certified once a case has been decided on the merits. *Hudson v. Chicago Teachers Union Local No. 1*, 117 F.R.D. 413, 415 (N.D. Ill. 1987), *on remand*, 106 S. Ct. 1066 (1986). Thus, for these reasons, we deny the motion to certify the class.

Finally, we agree with the Defendants' conclusion that the case is now moot. Of course, we recognize that

"voluntary cessation of illegal activity does not moot a case." *Hudson*, 106 S. Ct. at 1075 n. 14.

However, the cessation of illegal activity in this case was hardly voluntary. Rather, it was done at the insistence of this Court. Hence, any recurring violation would be done at the risk of invoking the contempt power of this Court.

Ergo, we find that this case is DISMISSED as moot. Judgment entered for Defendants.[1]

Case CLOSED.

ENTER: June 13, 1988

FOR THE COURT:

Richard Mills
RICHARD MILLS
United States District Judge

[1]Although we entered judgment for Defendants at this point, based on mootness, we do not find that this is dispositive of the issue of who is a "prevailing party" for purposes of attorney's fees under 42 U.S.C. §1988. This must wait for another day.

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinos 60604

May 24, 1989

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

JACK GILPIN, et al., Plaintiffs-Appellants,	)	
	)	Appeal from the United States District Court for the Central District of Illinois, Springfield Division.
No. 88-2441 vs.	)	
AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES, AFL-CIO, et al., Defendants-Appellees.	)	No. 85-C-3479 RICHARD MILLS, Judge

This cause was heard on the record from the United States District Court for the Central District of Illinois, Springfield Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, DISMISSED IN PART, with costs in this court to the defendants, in accordance with the opinion of this Court filed this date.

No. 89-292

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ESTATE OF JACK GILPIN,
Petitioner,
v.
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,
Respoindents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

RICHARD KIRSCHNER
(Counsel of Record)
LARRY P. WEINBERG
KIRSCHNER, WEINBERG & DEMPSEY
1615 L Street, N.W.
Washington, D.C. 20036
(202) 775-5900

Of Counsel:
JAMES COPPESS
1925 K Street, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF OPPOSITION

The opinions below and the basis for this Court's jurisdiction are correctly described in the petition for a writ of *certiorari*. Pet. 2.

STATEMENT OF THE CASE

This action was brought by nine employees of the State of Illinois who work in a collective bargaining unit represented by Local 2000, American Federation of State, County and Municipal Employees ("AFSCME" or "the Union") and who are required, under the applicable "fair share" fee agreement, to make fee payments in lieu of union dues to their exclusive bargaining representative.

In September 1985, after AFSCME had notified the affected employees that the fair share fee for the 1985-86

period would equal 90% of union dues, and had provided a brief explanation of how that percentage was determined, the State began making fair share fee payroll deductions. In response, the plaintiffs filed this suit challenging the fee program. Promptly thereafter, the plaintiffs moved for a preliminary injunction against the collection of fair share fees and for certification of a class of all State employees paying fees to AFSCME. The district court denied both motions. Pet. App. 2a.

The parties next filed cross-motions for summary judgment on the validity of AFSCME's 1985 fair share fee notice. The district court concluded that the 1985 notice did not contain sufficient information to meet the requirements of this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (which had issued after that notice had been prepared and distributed). That court also concluded that AFSCME's internal procedure through which fee payers could challenge the amount of the fair share fee was inadequate under *Hudson*. The district court found, however, that the Union's provision for escrowing fair share fees paid by employees who challenge the fee's amount was adequate under *Hudson*. Pet. App. 19a-22a.

In April 1986, just after the *Hudson* decision issued, and while the summary judgment motions described above were *sub judice*, AFSCME issued its 1986 fair share fee notice to fee payers. This ten page notice explained the basis for the 1986-87 fee in detail, and was mailed to each fee payer at his/her home. In addition to explaining the basis for the fee, which was set at 96% of dues, the 1986 notice informed fee payers of their right to challenge the amount of the fee before a neutral arbitrator. At the same time, AFSCME scheduled an arbitration covering all challenges filed to the basis for, or the amount of, the 1985-86 fee, the 1986-87 fee, or both. *See* Appellants' Court of Appeals Appendix in *Gilpin et al. v. AFSCME*, 7th Cir. No. 88-2441, App. B-56-67, Appellees' Court of Appeals Appendix, D-22-30.

Based on the post-*Hudson* changes in its objection procedures, AFSCME requested the district court to reconsider its summary judgment ruling. On reconsideration, the district court found the 1986 fair share fee notice legally proper in every respect but one; that court concluded that while AFSCME's arbitration procedure itself is adequate, the fair share fee notice should have contained more detail on how the arbitration of challenges would be conducted. Pet. App. 25a-27a.

In June 1987, AFSCME issued a fair share fee notice covering the 1987-88 period and incorporating all the legal requirements set down by the district court. The district court then entered judgment for the defendants. In so doing, that court concluded that the defects in AFSCME's 1985 and 1986 fair share fee notices did not harm the plaintiffs because challenges to the fees had in fact been filed, an arbitrator had in fact reviewed the fee calculations for the 1985-86 and the 1986-87 years, and the Union had undertaken to accord the benefit of the slight revision ordered by the arbitrator to the plaintiffs. The district court found, too, that AFSCME's 1987 fair share fee notice meets the *Hudson* requirements. Pet. App. 3a-4a.

The plaintiffs appealed the district court's decision, challenging the denial of a preliminary injunction and of class certification, the district court's conclusion that AFSCME's 1987 notice meets the requirements stated in *Hudson*, and the district court's refusal to require repayment, with interest, of *all* fair share fees collected since 1985. The court of appeals dismissed the preliminary injunction issue as moot, and affirmed the district court in all other respects. Pet. App. 4a.

ARGUMENT

The *certiorari* petition makes a single legal claim: subsequent to the issuance of the court of appeals' decision, this case has become moot and this Court should, on mootness grounds, vacate that decision. Pet. 4-6. That claim is entirely without substance.

We show first that this case is *not* in fact moot. Given the *certiorari* petition's theory, that demonstration requires that the petition be denied.

We then show that in cases that become moot after a court of appeals decision and that do *not* raise any issue warranting this Court's review, the proper course is to deny the *certiorari* petition, leaving the court of appeals' decision standing. Even on the assumption that this case is moot, that demonstration, too, requires that the *certiorari* petition here be denied.

1. a. In arguing that this case is moot the *certiorari* petition focuses solely on the claims of the lead named plaintiff, Jack Gilpin. The claims of the other named plaintiffs and of the class the plaintiffs sought to represent are simply *ignored.* The petition asserts that Mr. Gilpin died subsequent to issuance of the court of appeals decision, thereby mooting the claim for injunctive relief, and that, after the decision below, AFSCME sent Mr. Gilpin a "check[] in [an] amount[] that exceeded the amount of restitution petitioner had planned to request this Court to order thereby mooting the restitution claim." Pet. 4-5.

For the moment, we too will ignore the claims of the other named plaintiffs—who, so far as the petition shows, are alive and continue to work for the State and to be covered by fair share fee agreements—and of the proposed class, and show that the *certiorari* petition fails to demonstrate that eevn Mr. Glipin's claims are moot.

In the courts below, Mr. Gilpin requested "full restitution, with interest, of all fair share fees deducted since

September 1985, [and] the award of nominal damages, ..." Appellants' Court of Appeals Brief in *Gilpin, et al. v. AFSCME*, 7th Cir. No. 88-2441, at p. 39.[1] This restitution demand, translated into dollars and cents, equals $788.03.[2]

In the district court, as we have noted, AFSCME had obligated itself to accord the named plaintiffs in this case any benefits realized by employees who filed an arbitration challenge to the correctness of the agency fee calculation during the pendency of this case in that court. *See* pp. 2-3, *supra*.[3] Based on this undertaking, in July

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[1] The claim "for full restitution, with interest, of all fair share fees deducted since September, 1985," Appellants' Court of Appeals Brief 39, is the sum of two slightly different theories advanced by the plaintiffs in the court below. Based on the district court's finding that AFSCME's 1985 and 1986 notices were inadequate, the plaintiffs maintained that they were entitled to "restitution, with interest, of all fair share fees deducted between September, 1985 and June 30, 1987." *Id.* at 33. Based on their contention that the 1987 notice was also inadequate, the plaintiffs maintained that "the collections that occurred during the 1987-88 year were also illegal and should be return[ed], with interest, to all nonunion employees," and that "a permanent injunction should be issued against defendants enjoining all fair share fee deductions. . . ." *Id.* at 38.

[2] AFSCME's records reflect that $648.90 in fair share fees were deducted from Mr. Gilpin's pay beginning September 1985 and ending on his death in 1988. In light of Mr. Gilpin's pending lawsuit, AFSCME deposited all of these fees in an interest-bearing escrow account. At the time the funds were freed from that account earlier this year, the deductions from Mr. Gilpin's pay, together with interest, amounted to $788.03.

[3] As it turned out, this promise encompassed three fee years—1985-86, 1986-87 and 1987-88. Ruling on challenges to the 1985-86 fee, the arbitrator found that while AFSCME had set the fair share fee at 90% of union dues, the Union's fair share expenditures in fact entitled it to 95% of dues. Pet. App. 3a. Ruling on challenges to the 1986-87 fee, the arbitrator found that while AFSCME had set the fee equal to 96% of union dues, in fact the proper figure was 95% and ordered the Union to return the excess charge. *Id.* No employee challenged AFSCME's fee calculation for 1987-88.

1989, AFSCME refunded to each of the plaintiffs the 1% of 1986-87 fees found in excess of the proper fair share fee amount in the arbitration proceeding. In addition, to preclude the need for further litigation with the plaintiffs, AFSCME refunded the entire fee for 1987-88; a year in which this case was still pending in the district court, but in which no employee took a fee challenge to arbitration. Thus, AFSCME sent Mr. Gilpin a check for $233.78, representing 1% of the 1986-87 fee and 100% of the 1987-88 fee, plus interest.

From the foregoing, two points are clear beyond dispute:

First, this case was *not* moot when the court of appeals issued its decision. At that time, AFSCME had not yet refunded any of Mr. Gilpin's fair share fee payments.

Second, this case is *not* presently moot. The AFSCME payment of $233.78 to Mr. Gilpin is less than one third of the $788.03 Mr. Gilpin demanded as restitution in the courts below.[4]

b. What we have said thus far is dispositive with respect to the *certiorari* petition's assertion of mootness. However, for the sake of completeness we add that the

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[4] The *certiorari* petition does, as we have noted, assert that AFSCME's recent payment to the plaintiffs "exceeded the amount of restitution petitioner had planned to request this Court to order." Pet. 5. The footnote to this passage supports this assertion by theorizing that AFSCME's $233.78 payment to Mr. Gilpin represents 120% of the 1986-87 fee. *Id.* n.8. As we explain in text, this theory rests on a complete misunderstanding of the basis on which AFSCME proceeded.

Equally to the point, all that the petition claims is that AFSCME's payment is more than the petitioner "planned to request" for the *1986-86* fair share fee period. On that assumption, it remains true that AFSCME has not made restitution on fees paid by Mr. Gilpin from September 1985 through June 1986 and from July 1987 until his death in 1988. And there is nothing in the petition suggesting that the restitution claim for these fees has been abandoned. Thus, accepting the *certiorari* petition's theory Mr. Gilpin's case is *not* moot.

petition, in its rush to mootness, too quickly dismisses the claims of Mr. Gilpin's fellow named plaintiffs and of the class the named plaintiffs sought to represent.

The *certiorari* petition without any ceremony—and without a trace of concern—dispatches the other named plaintiffs and their legal claims in a footnote to the statement of parties. That footnote tersely asserts that in light of this Court's recent decision in *Torres v. Oakland Scavenger Co.*, —— U.S. ——, 108 S.Ct. 2405 (1988), and *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988) (applying *Torres*), the petition is filed only on behalf of Mr. Gilpin's estate "whose decedent was, in retrospect, the only appellant in the court of appeals." Pet. ii n.1. The named plaintiffs and the class deserve better.

The court of appeals proceeded on the assumption that all nine of the named plaintiffs had properly appealed and were before that court. Pet. App. 4a. Presumably what has now led the *certiorari* petition to state that "in retrospect" the other eight plaintiffs were not before the court below is the fact that the notice of appeal from the district court states that "Jack Gilpin, *et al.*, Plaintiffs above named, hereby appeal," and does not in the most literal terms conform to *Torres* by setting out the names of each of the other individual plaintiffs. But there is a *substantial* argument that the phrasing of the notice of appeal suffices to preserve all the named plaintiffs' legal claims and that those legal claims are live claims. *See Ford v. Nicks*, 866 F.2d 865, 869-70 (6th Cir. 1989).[5]

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[5] Unlike the *Torres* appeal notice which named 15 out of the 16 plaintiffs in that case, the notice in this case refers to "Jack Gilpin, *et al.*, Plaintiffs above named, ..." On a fair reading, this designation is clearly intended as shorthand for the full caption of all plaintiffs and defendants. Moreover, the notice of appeal specifically states that denial of class certification is being appealed, and since the same relief was requested on behalf of the named plaintiffs and the proposed class, this reinforces the conclusion that an

That being so, the blithe assertion—in a legal document signed by the named plaintiffs' own legal counsel—that their claims were not properly preserved is incomprehensible.

The *certiorari* petition does *not* offer any explanation at all of what has become of the proposed class. The notice of appeal, however, quite clearly states that "the denial of class certification" is being appealed. And, the law is plain that even if, contrary to our showing above, Mr. Gilpin's claims were moot, that does not mean the class certification issue is moot. "[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980) (footnote omitted). Moreover, *Torres* expressly leaves open the possibility that named plaintiffs left off a notice of appeal have the right to continue in the suit as members of a proposed class, 109 S.Ct. at 2409 n.3, and thus the right to intervene to petition for review of the class certification denial, *see United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393-395 (1977). The *certiorari* petition here could therefore have properly sought review of the lower court decisions denying class certification.

Thus, the class certification issue is *not* moot, and this case is *not* moot.

2. The *certiorari* petition does not suggest—much less demonstrate—that this case raises any substantive legal issue that warants the exercise of this Court's discretionary authority to review the decision below.[6] Nor does the

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appeal on behalf of all plaintiffs was taken. And, under *Ford v. Nicks, supra*, the test is whether "the context shows that *'et al.'* was intended to refer to all the others." 866 F.2d at 870. *See also King v. Atasco, Inc.*, 861 F.2d 438, 442-43 (5th Cir. 1988).

[6] The closest the petition comes to asserting that the issues here are cert-worthy is a footnote citing *Tierney v. City of Toledo*, 824

petition assert that this case was moot when the court of appeals ruled.

Given these omissions, we submit that even if the dispute presented to the court of appeals had in fact become moot after its decision, the petition for *certiorari* should be denied. *See, e.g., Velsicol Chemical Corp. v. United States*, 435 U.S. 942 (1978) (denying *certiorari* where parties agree that a case became moot after the court of appeals decision)[7]; *Bowen v. American Hospital*

F.2d 1497 (6th Cir. 1987), and *Gibney v. Toledo Federation of Teachers*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1988), and asserting that "[t]he court of appeals' denial of restitution conflicts with the allowance of restitution by the Sixth Circuit and the Ohio Supreme Court when the required *Hudson* safeguards are absent." Pet. 4 n.7. There is no such conflict.

The union fair share fee notice and hearing procedures in *Tierney* and *Gibney* were found to have *substantial constitutional defects*. The procedures here, in contrast, were found to have only minor defects that were cured by arbitration of AFSCME's fair share fee calculation and by the Union's issuance of an adequate notice to fee payers. Pet. App. 3a. In these very different circumstances, the denial of a restitution remedy by the courts below is not contrary to anything said or done in *Tierney* and *Gibney*.

Moreover, the decision of the court below is entirely consistent with this Court's direction that "[i]n determining what remedy will be appropriate . . ., the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977) (footnote omitted).

[7] The *certiorari* petition in *Velsicol Chemical Corp. v. United States, supra*, argued that the case had become moot so that the decision below should be vacated, and alternatively that, if the case were not moot, it presented issues worthy of resolution on *certiorari*. Petition for a Writ of Certiorari, Supreme Court No. 77-900, pp. 5-12. In responding to the petition, the United States granted *arguendo* that the dispute had become moot, but maintained that since the case was *not* otherwise worthy of review by this Court, the proper course was for the Court to deny the petition. Brief for the United States in Opposition, Supreme Court No. 77-900, pp. 4-8. And, of course, the Court did deny the petition.

Ass'n, 476 U.S. 610, 617 n.5 (1986) (explaining the denial of *certiorari* in *Infant Doe v. Bloomington Hospital*, 464 U.S. 961 (1983) (a case in which the petitioner died after the decision below and before this Court ruled on the *certiorari* petition).[8]

Because the Federal courts' Artcile III authority extends only to live cases and controversies, as the *certiorari* petition notes, counsel have an obligation to advise the Court "[w]hen a development *after this Court grants certiorari* or notes probable jurisdiction could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy . . . ." *Tiverton Bd. of License Commissioners v. Patore*, 469 U.S. 238, 240 (1985) (emphasis added).

But it does *not* follow that counsel should be encouraged to bother the Court with *certiorari* petitions that grow out of court of appeals' decisions that do *not* raise any issue warranting plenary review, simply to advise the Court that the case happens to have become moot within ninety days of the decision below.

At best, entertaining such petitions is a waste of the Court's time since by hypothesis the underlying issues would not be worthy of consideration on *certiorari* even if an Article III controversy were present. And, at worst,

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[8] As the cited cases show, the rule of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), which requires the vacation of a district court judgment in a case that becomes moot while pending in a court of appeals, has *no* application to a case that becomes moot while a *certiorari* petition is pending. When a case becomes moot while on appeal, the district court decision has not been subject to the appellate review *provided as a matter of right.*

Again, as the cited cases show, this Court's practice of vacating lower court decisions in cases that become moot after a writ of *certiorari* has issued, but before decision, relied on in the petition here, Pet. 4 (citing *Deakins v. Monaghan*, 484 U.S. 193 (1988)), does not extend to pending *certiorari* petitions. *See also Mintzes v. Buchanon*, 471 U.S. 154 (1985) (vacating order granting *certiorari* and dismissing petition upon death of the petitioner).

as this case indicates, a rule encouraging parties to file such petitions would needlessly increase the Court's workload by inviting losing litigants who have a continuing interest in a legal issue, who are dissatisfied with a lower court decision, and who lack confidence in their chances of securing a writ of *certiorari*, to allege mootness—with or without an adequate basis—in an attempt to eliminate an otherwise unassailable court of appeals opinion.[9]

Given the petitioners' total failure to raise any substantive issue worthy of review on *certiorari*, and the weakness of the mootness claim, the Court's usual practice of denying *certiorari* in cases such as this is particularly appropriate here.

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[9] To be sure, when a case that *would otherwise have been worthy of plenary consideration* becomes moot prior to the Court's ruling on a *certiorari* petition, the Court's practice is to grant the writ and vacate the lower court decision. The petition here, Pet. 4 & 6, cites two such cases: *Onwuasoanya v. United States*, —— U.S. ——, 109 S.Ct. 299 (1988), and *Honig v. Students of California for the Blind*, 471 U.S. 148 (1985).

In *Onwuasoanya v. United States, supra*, the United States in effect confessed error and requested that the court of appeals opinion be vacated. Memorandum for the United States in Supreme Court No. 88-28, pp. 3 & 5. *See also Floyd v. United States*, 860 F.2d 999, 1006-07 (10th Cir. 1988) (questioning the lower court decision in *Onwuasoanya*). In *Honig*, the underlying questions were of sufficient moment that three Justices dissented from the summary disposition of the case as moot. 471 U.S. at 150-152. *See also Students of California School for the Blind v. Honig*, 745 F.2d 582 (9th Cir. 1984) (dissenting opinion of six circuit judges who favored granting rehearing *en banc*).

For the reasons stated in the text, it would be unsound to treat substantial *certiorari* petitions and insubstantial petitions as a single class for mootness purposes.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

RICHARD KIRSCHNER
(Counsel of Record)
LARRY P. WEINBERG
KIRSCHNER, WEINBERG & DEMPSEY
1615 L Street, N.W.
Washington, D.C. 20036
(202) 775-5900

Of Counsel:
JAMES COPPESS
1925 K Street, N.W.
Washington, D.C. 20006

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Petitioner,

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AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,

Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION OF RESPONDENT AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

MILTON L. CHAPPELL
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel for Petitioner

October 6, 1989

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Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION OF RESPONDENT AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

INTRODUCTION

Petitioner, Estate of Jack Gilpin, hereby replies to the Brief in Opposition of Respondent American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME").[1]

[1]The other respondents, the State respondents, did not file any opposition to the petition for a writ of certiorari.

ARGUMENT

AFSCME presents two arguments against granting certiorari and vacating the judgment and opinion of the court of appeals in accordance with *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). First, it argues that its unilateral action has not mooted the case. Second, it misstates the law and contends that a case that becomes moot after a court of appeals decision, but does not otherwise raise any issue warranting Supreme Court review, is not eligible for the *Munsingwear* rule. Neither argument is correct.

1.a. AFSCME suggests that its unilateral payment of $233.78 to petitioner does not moot this case because it was less than one third of the $788.03 in fair share fees and interest that had been collected from Mr. Gilpin over three years.[2] Likewise, AFSCME incorrectly claims "there is nothing in the petition suggesting that the restitution claim for these fees has been abandoned."[3]

In clear and unmistakable terms the Estate of Jack Gilpin stated in its petition: "Petitioner has accepted this payment as *complete settlement* of *all* outstanding claims. Consequently, there no longer is a live controversy between the parties . . . ."[4] AFSCME cannot now complain because its unilateral attempt to moot one of the years, by refunding the entire fee for that year,[5] resulted in mooting

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[2]Brief in Opposition at 5-6 & nn. 2, 4.

[3]Brief in Opposition at 6 n.4.

[4]Petition for a Writ of Certiorari at 5 (emphasis added).

[5]AFSCME described its actions in its Brief in Opposition at 6 (emphasis added): "AFSCME refunded to *each* of the plaintiffs the 1% of 1986-87 fees found in excess of the proper fair share fee amount in the arbitration proceeding. In addition, *to preclude the*

all of the years when petitioner accepted AFSCME's unexpected, generous payment[6] as complete settlement of the entire case and controversy.

Plaintiff is master of his complaint and remains so at the appellate stage of the litigation.[7] Petitioner is completely satisfied with the amount of restitution provided by AFSCME's unilateral refunding of a portion of the fees collected. When petitioner makes such a decision "there is no longer a case or controversy before [the Court] . . . [and] the controversy . . . is now moot."[8]

1.b AFSCME criticized petitioner's counsel, Mr. Chappell, for "dismiss[ing] the claims of Mr. Gilpin's fellow named plaintiffs"[9] just because AFSCME differs with the conclusion reached by Mr. Chappell in satisfying his "Rule 11 obligations" by interpreting and applying this Court's

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need for further litigation with the plaintiffs, AFSCME refunded the *entire fee* for 1987-88; a year in which this case was still pending in the district court . . . ."

[6]The 1987-88 year for which AFSCME refunded the entire fee to avoid further litigation was the only year for which the courts had consistently upheld the constitutionality of AFSCME's collection scheme. *See* Appendix to Petition for a Writ of Certiorari at 3a, 10a-12a (court of appeals); 30a-33a (district court); Brief in Opposition at 3.

[7]*Webster v. Reproductive Health Services*, ___ U.S. ___, 109 S. Ct. 3040, 3053 (1989); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987).

[8]*Webster*, 109 S. Ct. at 3053; *see also Deakins v. Monaghan*, 484 U.S. 193, 199-201 (1988) (plaintiffs' willingness to withdraw their claims from federal court after a decision by the court of appeals and no longer seek any relief in federal court extinguishes any live controversy between the parties and makes plaintiffs' claims moot).

[9]Brief in Opposition at 7.

recent decision in *Torres v. Oakland Scavenger Co.*,[10] and the Seventh Circuit's application of *Torres* in *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*[11]

AFSCME's criticism is a cheap shot.[12] It is also an irrelevant tangent because AFSCME sent similar refund checks to the other named plaintiffs.[13] Accordingly, even if *Torres* had not prevented all plaintiffs from being petitioners herein, this case would still be moot because *all* plaintiffs received AFSCME's unexpected and unilateral refunds which far exceeded the 1% AFSCME previously had obligated itself to return.[14]

AFSCME also argues that the class certification issue is not moot because any petitioner could have continued the class certification claims, even though his substantive claims were moot, or members of the proposed class could have intervened to petition for review of the denial of the

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[10] ___ U.S. ___, 108 S. Ct. 2405 (1988).

[11] 857 F.2d 1176 (7th Cir. 1988).

[12] AFSCME's suggestion of a different conclusion is based on a *Sixth Circuit* decision directly contrary to the Seventh Circuit on this specific point. Obviously, counsel litigating in the Seventh Circuit must rely upon Seventh Circuit cases in exercising his "Rule 11 obligations," not Sixth Circuit cases.

[13] Petition for a Writ of Certiorari at 4-5; Brief in Opposition at 5-6.

[14] The other plaintiffs were informed of Mr. Chappell's legal conclusion regarding *Torres* and the effect of accepting AFSCME's unilateral refund check on their claims. They were also informed of the position petitioner would take in the petition. No plaintiff objected or sought other counsel.

class.[15] However, neither event occurred,[16] thereby leaving the class issue moot.[17]

2. AFSCME argues that cases which: a) become moot after a court of appeals decision but before the granting of a petition for certiorari and b) do not also raise any substantive issue warranting review, should not receive the *Munsingwear* treatment. Instead, AFSCME contends the certiorari petition should be denied, leaving the court of appeals' decision standing.[18]

AFSCME's position has been consistently rejected by this Court. First, in both of the cases previously cited to show mootness when plaintiffs decide not to pursue a

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[15]Brief in Opposition at 8.

[16]Mr. Chappell informed those potential class members for which he had addresses of the denial of the class certification by the court of appeals. He requested anyone who wanted to appeal the denial to contact him. No potential class member did so. Accordingly, petitioner decided not to pursue its claim for class certification.

[17]*Cf. Davis v. Ball Memorial Hospital Ass'n*, 753 F.2d 1410, 1416 (7th Cir. 1985) (in applying mootness principles of *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) applicable to class actions in which the claims of all the named plaintiffs but not all members of the class have become moot the court found that the issues presented are still "live" and not moot by the attempted intervention of unnamed class members, by the refusal of a tender of settlement or by the appeal of denial of class certification by the named plaintiffs); *see also Webster*, 109 S. Ct. at 3047-48, 3053-54 (named plaintiffs decided to withdraw some of their claims for declarative relief from their federal *class* action after court of appeals decision); *Deakins, supra*. Here, of course, there was no attempted intervention by other putative class members, and the union paid all named plaintiffs in the action to their satisfaction.

[18]Brief in Opposition at 8-11.

claim on appeal, this Court applied the *Munsingwear* rule.[19]

Second, the Court has rejected Justice Stevens' view that the petition for a writ of certiorari should be denied and *Munsingwear* not followed when "harm would [not] flow . . . if . . . the judgment of the Court of Appeals [were to] stand [and] there is no particular justification for this Court's intervention",[20] or "a highly technical and totally harmless error" is involved which would needlessly increase the Court's workload.[21]

Third, AFSCME made the following four arguments against the application of *Munsingwear*: the case became moot prior to ruling on the certiorari petition; applying *Munsingwear* would "eliminate an otherwise unassailable court of appeals opinion";[22] the Court in *Velsicol Chemical Corp. v. United States*[23] merely denied the petition although the *Munsingwear* rule had been requested; and *Munsingwear* is only applicable to mootness that prevents court of appeals review or "review provided as a matter of right".[24] These same four arguments were made by the

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[19]*Webster*, 109 S. Ct. at 3053-54; *Deakins*, 484 U.S. at 199-201.

[20]*Alabama v. Davis*, 446 U.S. 903 (1980).

[21]*Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979) (majority criticized the court of appeals for failing to follow the *Munsingwear* rule even though its motive in refusing to vacate the decision was to show its approval of the reasoning of the lower court).

[22]Brief in Opposition at 11.

[23]435 U.S. 942 (1978).

[24]Brief in Opposition at 10 & n.8 (emphasis omitted).

Chicago Board of Trade[25] in two appeals in which it was involved. All four arguments were apparently rejected when this Court, without dissent, followed the *Munsingwear* rule and vacated the Seventh Circuit's decision in both appeals.[26]

CONCLUSION

For the foregoing reasons, this Court should reject AFSCME's opposition, grant the writ of certiorari, vacate the judgment and opinion of the court of appeals, and remand with instructions to dismiss the cause as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Respectfully submitted,

Milton L. Chappell, Esquire
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel for Petitioner,
Estate of Jack Gilpin

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[25]Brief for the Board of Trade of Chicago in Opposition to the Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Supreme Court Nos. 82-327, 82-526, pp. 6-18.

[26]*Chicago Board Options Exchange v. Board of Trade*, 459 U.S. 1026 (1982); *SEC v. Board of Trade*, 459 U.S. 1026 (1982).